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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GUO LIANG LI et al.,

Plaintiffs and Appellants,

v.

DANIEL WU et al.,

Defendant and Respondent.

B196993 c/w B198266

(Los Angeles County
Super. Ct. No. GC035983)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, C. Edward Simpson, Judge. Affirmed.

Hunt Ortmann Palffy Nieves Lubka Darling & Mah, Inc., Lawrence P. Lubka and Carlo Paciulli; Cynthia Bi and Min Hwa Chung for Plaintiffs and Appellants.

Law Office of Richard Meaglia and Richard Meaglia for Defendant and Respondent.

A parcel of land was owned by two couples. They hired a contractor to build two houses on the property. A dispute arose with the contractor after the houses had been largely, but not completely, constructed. The owners ultimately terminated the contractor from the project, and completed construction at their own cost. The owners sued the contractor for the costs of completion, loss of use damages, and the cost of fixing items defectively constructed by the contractor. The contractor cross-complained for the amounts unpaid under the contract, and the additional cost of several changes to the work allegedly requested by the owners. Subsequently, the owners sought to amend their complaint to allege a cause of action seeking disgorgement of all funds they had paid the contractor, on the basis that the contractor's license had been suspended by operation of law during his work on the houses; the trial court denied this request. The jury reached a verdict in favor of the owners and against the contractor, although not in the amount the owners had sought. The owners then sought their attorney's fees, on the basis that the contractor had initially pleaded a statutory cause of action under which the prevailing party is entitled to attorney's fees. The trial court denied this motion on the ground that the contractor had not pursued that cause of action. Both parties appeal. The owners challenge the trial court's denial of their motion to amend their complaint to seek disgorgement and the denial of their motion for attorney's fees. The contractor appeals from the judgment, challenging the sufficiency of the evidence supporting the award in favor of the owners, and also asserting that the trial court failed to offset the unpaid balance on the contract against the award in favor of the owners. We affirm in all respects.

FACTUAL AND PROCEDURAL BACKGROUND

The property owners in this case are Guo Liang Li and Guiqin Zong, and Min Hwa Chung and Cynthia Bi. The contractor is Daniel Wu, doing business as Giantech International. On September 3, 2003, the owners entered into a contract with the contractor to construct two homes on a single parcel for the sum of \$304,056. The work was to be completed within seven months, with no excuses for any delays aside from earthquake. Under the terms of the contract, the owners were to make a \$1000 down payment. Thereafter, they were to make seven monthly progress payments of \$40,000, with a final payment of \$24,056 to be paid upon completion of the project.

This much is undisputed: (1) construction proceeded apace through February 2004; (2) the owners made the seven monthly progress payments during this time;¹ (3) at some point, the contractor stopped work on the project before it had been completed; (4) the owners officially terminated the contract on June 28, 2005; and (5) the owners completed work on the houses, obtaining a certificate of occupancy on September 13, 2005.

In short, the project was ultimately completed approximately one and one-half years after the date it was to have been finished under the contract. The parties offered different explanations for the delay. The contractor testified that he completed his work in a timely manner, but was slowed by the owners' failure to complete a small amount

¹ For reasons unclear from the record, the \$40,000 payments began in August 2003, prior to the execution of the written agreement.

of work that was outside the scope of his contract. The owners testified that the contractor asked for additional funds to complete the work he had contracted to perform. When the owners refused to pay, the contractor indicated that certain remaining work was outside the scope of the contract, and offered a bid for this non-contract work. When the owners rejected his bid, believing it to be overinflated, the contractor walked off the job.

In late 2004, after the contractor had stopped work, the owners filed a claim against the contractor's license bond. The surety settled the claim for \$10,000.

At some point, Li had loaned the contractor \$50,000. He brought suit against the contractor to recover this amount, plus interest.² On September 30, 2005, the contractor filed a cross-complaint against all four owners, for breach of contract and related causes of action, seeking the final contract payment of \$24,056, and an additional \$14,565 for additional work he had allegedly performed at the owners' request. Also, the contractor alleged that the owners had made a false claim against his license bond, and sought a refund of \$10,000 paid on the bond.³ Finally, Civil Code section 3260, subdivision (g) provides that, if a property owner withholds retention payments owed a contractor without the existence of a bona fide dispute, the contractor is entitled to 2% interest per month, and the prevailing party is entitled to attorney's fees in any action for the

² Ultimately, the contractor would stipulate that he owed Li these amounts.

³ Apparently, the contractor had been required to repay the \$10,000 to the surety.

collection of retention funds wrongfully withheld. The contractor specifically pleaded a cause of action under this section, seeking 2% monthly interest and attorney's fees.⁴

The owners filed an answer, in which they asserted numerous affirmative defenses. One such defense was that the contractor "was not properly licensed at all times during the project in issue and is therefore barred from recovery of any compensation."

The owners also filed a cross-complaint against the contractor for breach of contract. They alleged that the contractor breached the contract by falling substantially behind schedule, abandoning the project, and performing substandard work.

Discovery proceeded. The law requires contractors to obtain and maintain workers compensation insurance if they have employees; if they have no employees, they can file an exemption from the requirement. (Bus. & Prof. Code, § 7125.2.) In June 2006, the contractor answered written interrogatories indicating that he had employees working on the job and that he had a workers' compensation policy with State Fund. However, the contractor had not obtained this workers' compensation insurance until October 2004; prior to that time, he had filed an exemption from the workers' compensation requirement on the basis that he had no employees. On October 13, 2006, the contractor was deposed, and again indicated the use of his own

⁴ Civil Code section 3260.1, subdivision (b) provides that "the penalty specified in subdivision (g) of Section 3260" also applies when the owner improperly withholds a *progress* payment. The contractor's cause of action referred to both sections of the Civil Code, but stated it was based on the improper withholding of "retention money," not progress payments.

employees on the project. The contractor's testimony indicated that employees were used early in the project, from which the owners inferred that the contractor had employees prior to the time he obtained workers' compensation insurance.

Trial was set for November 13, 2006. On November 6, 2006, the owners filed an ex parte application to shorten time or, in the alternative, to hear a motion for leave to file a first amended complaint. The owners took the position that the failure to obtain workers' compensation insurance results in an automatic suspension of a contractor's license. Since the contractor apparently had employees working on the project prior to the date he obtained workers' compensation insurance, the owners argued that the contractor's license was suspended during the job, therefore entitling them to disgorgement of all money paid the contractor. They sought to amend their complaint to allege a cause of action for disgorgement. The contractor opposed the ex parte application, arguing that the owners' delay in bringing the motion was highly prejudicial, in that it added numerous issues one week before trial.

The trial court denied the ex parte motion. The owners have declined to designate the reporter's transcript of the hearing on the ex parte motion as part of the record on appeal, nor did they include the minute order from that date in their appellants' appendix. Thus, the basis of the trial court's denial is not clear from the record. According to the trial brief filed by the owners, the motion was denied but the owners were "instructed" to "seek to amend their complaint to conform to proof."

According to a motion in limine filed by the contractor, the court denied the ex parte application “since it was not a timely request.”⁵

The contractor filed a motion in limine to exclude any reference at trial to his alleged failure to obtain workers’ compensation insurance. The owners took the position that, even in the absence of their amended complaint, the failure to obtain workers’ compensation insurance was relevant to their affirmative defense that the contractor was unlicensed. The court agreed that the owners could introduce evidence on this issue outside the presence of the jury. Subsequently, the court granted the motion in limine, concluding that even if the contractor failed to obtain workers’ compensation insurance when he had employees, that fact would not result in an automatic suspension of his license. Nonetheless, the court would allow the owners to make a record of their evidence on the issue.

The case proceeded to jury trial. The owners introduced evidence that the contractor had abandoned the job and performed substandard work. They offered the testimony of an expert that the houses contained upwards of 40 defects – some minor, some substantial – which could be repaired at a total cost of \$150,000. They also offered evidence that the fair rental value of the houses, had they been completed in April 2004, would have been \$2800 per month per house. The contractor introduced

⁵ At the hearing on the motions in limine, the court asked counsel if the court had ruled on the ex parte motion. Counsel for the contractor stated, “I don’t think that you did rule at that time.” This appears to be mistaken as both parties had previously filed documents indicating that the motion had been denied. The court ultimately stated that, to the extent to motion for leave to amend was outstanding, it was then denied.

evidence that any delays in construction were the fault of the owners. He offered the testimony of an expert who challenged the list of defects identified by the owners' expert. The contractor's expert said that some of the repairs suggested by the owners' expert were unnecessary, and others were substantially overpriced. He testified that all necessary repairs could be made for \$17,901.76. The contractor also offered evidence that the fair rental value of the houses would have been \$2100 each. At no time did the contractor pursue his cause of action for wrongfully withheld retention payments under Civil Code section 3260. While the contractor did argue that he had a right to the \$24,056 final payment, he never introduced evidence or argument that the payment constituted retention, or that there was no bona fide dispute entitling the owners to withhold it.

While the jury deliberated, the trial court permitted the owners to introduce their evidence regarding whether the contractor had been in violation of the workers' compensation requirement. After hearing the evidence, the court stated that it would not rule on whether the contractor had been required to have workers' compensation insurance before the time he had obtained it. The court concluded that even if the requirement had applied, the contractor's failure to obtain insurance would not have resulted in the automatic suspension of his license, but only administrative action.

The jury had been given two separate verdict forms – one for each cross-complaint. On the owners' cross-complaint, the jury found the contractor had breached the contract. The jury concluded that: (1) the contractor's work had been defective, and the reasonable cost of correcting the defects was \$52,904.96; (2) the

damages to the owners for completing the work the contractor had failed to perform were \$5,556; and (3) the damages to the owners caused by the contractor's inexcusable delay were \$30,000. On the contractor's cross-complaint, the jury concluded that the contractor had failed to substantially perform and was not excused from performance; given those findings, no damages were awarded.

In determining the amount of the judgment, the court stated that \$10,000, for the bond payment, should be deducted from the amount awarded to the owners. The court asked the owners' counsel if that was correct; counsel responded, "Yes. That is correct." Judgment was entered in favor of the owners in the amount of \$78,460, comprised of the three amounts awarded by the jury, less the \$10,000 credit for the bond payment.

The contractor moved for a new trial or judgment notwithstanding the verdict. In these motions, he argued, among other things, that the \$24,056 final payment amount should be deducted from the owners' award. The court denied the motions, suggesting that the jury could have already made that deduction in its calculation of damages.

The owners moved for attorney's fees, arguing that they were the prevailing party on the contractor's cause of action under Civil Code section 3260. The contractor opposed, arguing that he had withdrawn the cause of action; his counsel having told opposing counsel as much at the time of the contractor's deposition, and again at the status conference. The trial court denied the motion on the basis that the cause of action had been withdrawn.

The contractor filed a timely notice of appeal from the judgment. The owners also timely appealed from the judgment, and further appealed from the denial of attorney's fees. While the owners had been jointly represented at trial, Chung and Bi have chosen to represent themselves on appeal, while Li and Zong are represented by trial counsel.

ISSUES ON APPEAL

We consider the issues raised by the parties in the following order: (1) the contractor's contention that the evidence is insufficient to support an award of loss of use damages; (2) the related contention that damages are limited by the contract to the costs of completion; (3) the contractor's contention that he should have been credited \$24,056 for the unpaid balance on the account; (4) the owners' contention that the court erred in denying their motion for leave to file a first amended complaint and in granting the motion in limine precluding evidence on the issue of the contractor's possible violation of the licensing laws; (5) the contention of Chung and Bi that the court erred in offsetting the \$10,000 bond payment against their recovery; and (6) the owners' contention that the court erred in denying them attorney's fees.

DISCUSSION

1. Sufficiency of the Evidence

The contractor first contends the evidence is insufficient to support the jury's award of loss of use damages. Specifically, the contractor argues that there could not have been any loss of use damages until the earliest date at which the certificate of occupancy could have issued. Relying on evidence that the city required the owners to

complete some work which had been outside the scope of the contract in order to issue the certificate of occupancy, the contractor argues that all of the delay is attributable to the owners' failure to complete their work in a timely manner.

“When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment.” (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.) In reviewing the evidence on appeal, all conflicts must be resolved in favor of the judgment, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible. When a judgment is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571; *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

In this case, the jury awarded \$30,000 for loss of use damages. While the precise calculation leading to this number is unclear, the jury very easily could have concluded the fair rental value of the properties was \$2500 each and that the contractor was responsible for six months of the nearly 18-month delay. The contractor relies on evidence that, prior to the issuance of the certificate of occupancy, the city required the

owners to make changes to the work that had been the owners' responsibility under the contract. Yet the owners introduced evidence that they had completed the bulk of their work by December 22, 2004, and attempted to convince the contractor to return to complete *his* portion of the work on January 9, 2005. The contractor responded by demanding more money, and promising that the work would be completed in two months. The contractor did not finish the work as promised; instead, he was busy on another worksite. On June 28, 2005, the owners terminated the contractor from the job. While it then took the owners until September 13, 2005, to obtain a certificate of occupancy, it is clear that the owners could have begun and completed their work three and one-half months earlier if the contractor had returned to the job when requested. Moreover, there were additional delays which the jury could have attributed to the contractor. Li testified that the contractor's work slowed in February 2004 and ultimately halted in April 2004. The contractor himself testified that he did no work on the job from July 2004 to October 2004. In short, while the evidence indicates that the owners did not finalize their portion of the work until September 2005, the evidence also indicates that the owners' delay in finalization was attributable, at least in part, to the contractor's delay and ultimate abandonment of the project.

2. Damages Not Limited by Contract

The contractor next contends that the contract limited the owners' damages to the cost of completing the work. The contention is meritless.

The contractor relies on paragraph 11.2.4., which is under heading 11.2, discussing termination of the contract by the owner. Paragraph 11.2.2 provides that,

after the owners terminate the contract, they may finish the work themselves.

Paragraph 11.2.4 provides that they can recover the costs of completing the work.

However, the paragraph does not state that this is the exclusive remedy to the owners for the contractor's breach of contract. Instead, other paragraphs also apply.

Paragraph 9.2 provides that the contractor warrants his work for one year, and that he will correct all nonconforming work. Paragraph 9.3 provides that if the contractor does not correct the work within a reasonable time, the owners may correct the work, and the contractor shall reimburse the owners for the cost of correction. Clearly, this paragraph provides a basis for an award of damages to correct the substandard work performed by the contractor. Paragraph 2.4.3 provides that costs caused by "delays . . . or defective construction shall be borne by the party responsible therefor." This paragraph, therefore, provides a basis for an award of loss of use damages. Thus, all damages awarded by the jury were awarded pursuant to the contract.

3. No Additional Credit for the Final Payment

Paragraph 11.2.4 of the contract, which applies when the owners terminate the contract and complete the work themselves, provides as follows: "If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, such excess shall be paid to the Contractor. If such costs exceed the unpaid balance, the Contractor shall pay the difference to the Owner." As it is undisputed that the owners never paid the contractor the final payment of \$24,056, the contractor argues that this amount should be deducted from the jury's award.

The contractor further argues that the jury could not have made the deduction itself due to instructional error. CACI No. 354 is a jury instruction addressing the owners' burden in proving damages for breach of a construction contract. That instruction provides as follows⁶: "To recover damages for breach of a contract to construct improvements on real property, [*name of plaintiff*] must prove: [¶] [The reasonable cost to [*name of plaintiff*] of completing the work;] [¶] [And the value of loss of use of the property;] [¶] [Less any amounts unpaid under the contract with [*name of defendant*].]" In discussing the jury instructions to be given, the trial court struck the last paragraph of CACI No. 354, on the basis that the use of two separate verdict forms would resolve the issue. In other words, the trial court believed that any amounts unpaid under the contract would be awarded to the contractor on his cross-complaint, and the court could then offset the two awards against each other. The contractor argues that this was error, because the special verdict form on his cross-complaint required the jury to find that the owners had breached the contract in order to award the contractor damages, while the offset of amounts unpaid under the contract is a necessary element of the calculation of damages due the owners for the contractor's breach.

The contractor's argument is correct; both the contract and California law provide that, when measuring the owner's damages for a contractor's breach of contract, the unpaid balance due to the contractor is to be offset against the costs of completion

⁶ We omit two inapplicable paragraphs, and one set of brackets.

incurred by the owner. However, there is no error because it is clear that the trial court did, in fact, instruct the jury to include the necessary offset in its calculations. The court specifically instructed the jury, “If a contractor breaches a construction contract, the measure of the owners’ damages is the difference between the balance due on the construction contract and the cost of completing the work the contractor had agreed to do. [¶] If the cost of completion is less than the balance of the original contract price due the contractor, the contractor is entitled to the remaining balance.” The jury was also instructed that the purpose of contract damages “is to put the owners in as good a position as they [would] have been if the contractor had performed as promised.”⁷ “We presume the jury followed the trial court’s instructions.” (*Plut v. Fireman’s Fund Ins. Co.* (2000) 85 Cal.App.4th 98, 106.) Thus, we presume that the jury *did* offset the \$24,056 against the owners’ damages when calculating the cost of completion damages awarded the owners. The court’s instructional error is nonprejudicial, and the court was not required to again deduct the \$24,056 from the damages awarded.

4. *Workers’ Compensation*

Business and Professions Code section 7031, subdivision (a) provides that “no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state

⁷ Indeed, in the owners’ opening statement to the jury, the owners’ counsel stated that “[t]he homeowners have a right at the end of the day to show that they paid no more than \$304,056 for those two structures.” Counsel argued that he would establish “that the cost [of] completing the work was in excess of” the unpaid \$24,056.

for the collection of compensation for the performance of any act or contract where a license is required . . . without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract.” Subdivision (b) of that section provides that “a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract.” Both subdivisions are subject to the doctrine of substantial compliance, but only under specific circumstances. (Bus. & Prof. Code, § 7031, subd. (e).)

Business and Professions Code section 7125 provides that all contractors, in order to obtain or maintain a license, must possess workers’ compensation insurance, or file an exemption indicating no employees. Business and Professions Code section 7125.2 sets forth the consequences of not obtaining or maintaining workers’ compensation insurance. That section provides, in pertinent part, “The failure of a licensee to obtain or maintain workers’ compensation insurance coverage, if required under this chapter, shall result in the automatic suspension of the license by operation of law in accordance with the provisions of this section, [¶] (a) The license suspension imposed by this section is effective upon the earlier of either of the following: [¶] (1) On the date that the relevant workers’ compensation insurance coverage lapses. [¶] (2) On the date that workers’ compensation coverage is required to be obtained. [¶] (b) A licensee who is subject to suspension under paragraph (1) of subdivision (a) shall be provided a notice by the registrar that includes all of the following: [¶] (1) The reason for the license suspension and the effective date. [¶]

(2) A statement informing the licensee that a pending suspension will be posted to the license record for not more than 45 days prior to the posting of any license suspension periods required under this article. [¶] (3) The procedures required to reinstate the license.”

Under the language of this statute, a contractor whose license is subject to suspension for allowing his or her workers’ compensation insurance to *lapse* is entitled to notice prior to the suspension of his or her license; but a contractor whose license is subject to suspension for failing to *obtain* workers’ compensation insurance is subject to automatic suspension without notice. (*Wright v. Issak* (2007) 149 Cal.App.4th 1116, 1120-1121.) As applied to this case, the owners argued that the contractor’s license was automatically suspended by operation of law as soon as the contractor hired an employee and did not obtain workers’ compensation insurance. As such, the owners argued that the contractor was unlicensed during a portion of the work he performed on the owners’ houses, and was therefore barred from bringing suit against them, and required to disgorge all money he had been paid.

The trial court disagreed with the owners’ position, taking the position that the contractor’s license was not suspended because he had not received notice. This was error.⁸ Notice is not required for a suspension for failure to obtain workers’ compensation insurance. However, any error was necessarily harmless.

⁸ The trial court did not have the benefit of the *Wright v. Issak* opinion, and was instead relying in *Smith v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 117, a case interpreting an earlier version of Business and Professions Code section 7125.2,

The owners suggest that the trial court's error resulted in the denial of their motion for leave to amend their complaint to allege a cause of action for disgorgement. This is incorrect. The motion to amend was brought as an ex parte application one week before trial. Although the owners have failed to designate a complete record with respect to the proceedings on that application, the limited record before us indicates that the application may have been denied as *untimely*. The contractor's deposition, at which he gave the testimony which prompted the owners to seek disgorgement, took place on October 13, 2006 – one full month prior to the November 13, 2006, trial date. However, the owners did not seek to amend their complaint until November 6, 2006, one week before trial. The proposed disgorgement cause of action would have required further discovery, with evidence taken on the issue of whether the individuals working for the contractor were employees or independent contractors, and whether the contractor had substantially complied with the workers' compensation requirement. The trial court did not abuse its discretion in denying the application brought on the eve of trial, with no rationale given to explain the delay. Thus, any error in the court's interpretation of Business and Professions Code section 7125.2 did not cause the denial of leave to amend.

Similarly, the owners suggest the trial court erred in granting the contractor's motion in limine to exclude all evidence on the issue of the validity of the contractor's license with respect to the workers' compensation requirement. But, in the absence of

which did not draw a distinction between the failure to *obtain* insurance and the failure to *maintain* it.

the disgorgement cause of action, the evidence would have been relevant only to the owners' affirmative defense raised in opposition to the contractor's cross-complaint. As the jury found in the owners' favor on the contractor's cross-complaint, any error was necessarily harmless.⁹

5. *The Bond Offset*

Chung and Bi contend the trial court erred in offsetting against their award the \$10,000 the owners had been paid on their claim against the contractor's license bond. At trial, counsel for all four owners agreed that the offset was proper. The contention is therefore waived.

6. *Attorney's Fees*

All four owners contend the trial court erred in denying their motion for attorney's fees as prevailing party on the contractor's statutory cause of action for the improper withholding of retention payments. Civil Code section 3260, subdivision (g) provides, "In the event that retention payments are not made [as required], the owner . . . withholding the unpaid amounts shall be subject to a charge of 2 percent per month on the improperly withheld amount, in lieu of any interest otherwise due. Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs." Civil Code

⁹ The owners do not suggest that the contractor's alleged failure to comply with the licensing requirement would result in the loss of the offset of \$24,056 in the calculation of the owners' damages.

section 3260.1 provides that the penalty specified in subdivision (g) of Section 3260 applies if an owner wrongfully withholds a progress payment.¹⁰

It is undisputed that the contractor originally pleaded a cause of action for the wrongful withholding of retention payments, and cited both of these statutes. It is also undisputed that, on the whole, the owners prevailed at trial while the contractor did not. The owners argue that they are therefore entitled to fees under these statutes as a matter of law. They are incorrect.

A trial court has discretion to award fees under Civil Code section 3260. Although the provision provides that the “prevailing party shall” be awarded fees, the statute has no definition of “prevailing party,” and the trial court therefore possesses discretion to find that there is no prevailing party. (*Brawley v. J.C. Interiors, Inc.* (2008) 161 Cal.App.4th 1126, 1137.) This is to be determined on a practical level after considering what each party accomplished in the litigation. (*Ibid.*) We do not disturb the trial court’s discretionary decision in the absence of a clear showing of abuse, resulting in an injury sufficiently grave as to amount to a manifest miscarriage of justice. (*Ibid.*)

In this case, the court denied attorney’s fees on the basis that a “balanced reading of the record supports the contractor’s withdrawal of his” claims under Civil Code sections 3260 and 3260.1. We interpret this to mean that the trial court concluded there

¹⁰ There is some suggestion in the law that this provision may incorporate only the 2% monthly interest *penalty*, not the right of the prevailing party to attorney’s fees. (*Murray’s Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1299, fn. 14.)

was no prevailing party on the cause of action under the statutes. (Cf. Civ. Code, § 1717, subd. (b)(2) [providing that there is no prevailing party on a contract providing for attorney's fees when the action has been voluntarily dismissed].) The evidence indicated that, at the contractor's deposition, all counsel discussed the applicability of Civil Code sections 3260 and 3260.1, and agreed that the sections did not apply to a final payment.¹¹ The contractor's counsel then stated that relief under those statutes would not be pursued, and repeated this statement at the final status conference. The statutes were not mentioned in either party's trial brief. At trial, no time was expended on the statutory cause of action.¹² No evidence was introduced as to whether a bona fide dispute existed. No argument was made as to whether the final payment constituted a retention payment. No jury instructions were sought regarding the provisions of the statutes. No findings from the jury were sought regarding the elements of a cause of action under the statutes. In short, the trial court did not abuse its discretion in concluding that the statutory cause of action was withdrawn.

¹¹ A final payment is not a progress payment. (*Murray's Iron Works, Inc. v. Boyce*, *supra*, 158 Cal.App.4th at p. 1299.) A final payment may be comprised, in whole or in part, of retention, but retention payments relate to an amount *held back* from installment payments until all work is complete. (*McAndrew v. Hazegh* (2005) 128 Cal.App.4th 1563, 1566-1567.) It is not clear from the parties' contract whether the final payment included retention from the earlier installment payments, or was simply to be a payment for the work performed after the seven installment payments.

¹² To the extent that evidence was taken on whether the payment was withheld, it was undisputed that the owners did not make the final payment.

On appeal, the owners make much of the fact that the statutory cause of action was not technically dismissed pursuant to Code of Civil Procedure section 581. While the owners may be correct, it is irrelevant. The prevailing party determination is to be a *practical* one, not a hyper-technical one. It is apparent that the statutory cause of action was not *pursued*, and the trial court therefore did not err in concluding that there was no prevailing party.¹³

DISPOSITION

The judgment and post-trial order are affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.

¹³ Chung and Bi further argue that they should be entitled to their attorney's fees as a matter of right. Their argument, basically, is that they were drawn into this lawsuit as a result of Li suing the contractor on a debt, and they should not be forced to pay substantial attorney's fees for what was, in effect, someone else's fight. Equitable concerns simply do not constitute a legal basis for fee-shifting.